

1984 S.C. Op. Atty. Gen. 333 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-138, 1984 WL 159944

Office of the Attorney General

State of South Carolina

Opinion No. 84-138

December 17, 1984

**\*1 RE: Constitutionality of [Section 32-7-90, CODE OF LAWS, 1976](#)**

Honorable Ramon Schwartz, Jr.  
Speaker of The House  
House of Representatives  
Law Range  
Sumter, South Carolina 29150

Dear Speaker Schwartz:

Your letter of October 18, 1984 to Attorney General Medlock has been referred to me for a response. You may recall that you raised the question of whether [§ 32-7-90, CODE OF LAWS OF SOUTH CAROLINA, \(1976\)](#), constitutes an unconstitutional restraint of trade.

As you are aware, [§ 32-7-90, CODE](#), provides as follows:

It shall be unlawful for any licensee, or the agent of a licensee, who sells preneed burial contracts to solicit or publicly advertise the availability of such contracts.

Violation of [§ 32-7-90](#) constitutes a misdemeanor and is punishable by a fine of not less than \$500.00 nor more than \$1,000 or imprisonment for not less than 10 days nor more than 6 months or both. [§ 32-7-100, CODE](#).

[Sections 32-7-90](#) and [32-7-100](#) are contained within a statutory scheme which defines preneed burial contracts and establishes procedures which must be followed by any person who sells preneed burial contracts. A preneed burial contract is defined as 'a contract, which has for its purpose the furnishing or performance of funeral services, or the furnishing or delivery of personal property, merchandise, services of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, but does not mean the furnishing of a cemetery lot, crypt, niche, mausoleum, grave marker or monument.' [§ 32-7-10, CODE](#).

The statutory scheme goes on to require that any payments for preneed burial contracts be considered trust funds. All payments received must be deposited in a financial institution and the person who receives the funds is trustee of those funds. [Section 32-7-20\(a\), CODE](#). The scheme has several other important provisions such as requiring any person who sells preneed contracts to obtain a license from the South Carolina State Board of Bank Control. [Section 32-7-50, CODE](#), and providing that the licensee keep accounts, books and records of all preneed transactions. [Section 32-7-70, CODE](#). There are several other significant features of the statutory scheme, but they need not be detailed here except to note that almost all provisions of the statutory scheme are designed to provide substantial protection to individuals who purchase preneed burial services.

Notwithstanding the substantial protections provided by [§ 32-7-10, et seq., CODE](#), the Legislature deemed it appropriate to enact a general prohibition on advertising preneed burial contracts contained at [32-7-90, CODE](#). The prohibition, however, does not limit the preneed sale of cemetery lots, crypts, grave markers or monuments.

The specific question you raised is whether § 32-7-90, CODE, constitutes an unconstitutional restraint of trade. For the reason stated below, it is our opinion that § 32-7-90 is probably unconstitutional on its face.

\*2 The statute in question here prescribes limitations on expression and speech, albeit commercial speech. The United States, Supreme Court has held that commercial speech is entitled to the protections afforded by the First and Fourteenth Amendments. Va. Pharmacy Board. v. Va. Citizens Consumer Counsel, 425 U.S. 78 (1976). Va. Pharmacy Board. applied to advertising of prices of prescription drugs by pharmacists, and the Court held such restriction to be unconstitutional. In a subsequent case, the High Court held that advertising by lawyers was a form of commercial speech protected by the First Amendment, and such advertising is not subject to blanket suppression. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). More specifically, the Court in Bates held that lawyers must be permitted to advertise fees they charge for certain 'routine' services.

The Supreme Court was then faced with the question of whether lawyers may be prohibited from listing in advertisements areas of expertise and the courts to which they were admitted to practice. The Court held that such regulation was unconstitutional. In Re R.M.J., 455 U.S. 191 (1982). In that case, the Court set out the following guidelines for regulation of commercial speech: Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S. at 375. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-564 (1980). Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.

I apologize for the lengthy recitation above, but I believe it contains a good summary of the law in the area of regulation and prohibition of commercial speech.

\*3 I also point out that the general proposition that an enactment of the Legislature is presumed to be constitutional may not apply to § 32-7-90, CODE. In City of Mobile v. Bolden, 446 U.S. 55 (1980), the U. S. Supreme Court noted: It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional. [Cites omitted]. 446 U.S. at 76.

In any event, we do not believe that the blanket prohibition on advertising preneed funeral contracts would pass muster under the holdings in Va. Pharmacy, *supra*, Bates, *supra*, and R.M.J., *supra*. The Supreme Court has decided that the free flow or commercial speech is protected by the First Amendment, and that, as a general rule, blanket prohibition on the dissemination of truthful commercial expression is prohibited. It is, therefore, the opinion of this Office that § 32-7-90, CODE, is probably unconstitutional.

Sincerely,

William K. Moore  
Senior Assistant Attorney General

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